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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1940.

314-644

No. 232

CHARLES M. KOEBERLEIN,

Petitioner,

vs.

GEORGE W. DURBIN AND MINNIE L. DURBIN, THE CARTER OIL COMPANY, MABEL DURBIN AND HARVEY H. DURBIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States:

Petitioner, Charles M. Koeberlein, of St. Elmo, Illinois, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involves the title to lands in Fayette County, Illinois. The only controversy is between the petitioner, Charles M. Koeberlein, and George W. Durbin and Minnie L. Durbin, his wife, hereinafter referred to as "respondents." Mabel Durbin and Harvey H. Durbin are only nominal parties to the proceedings, and claim no interest in said lands. The Carter Oil Company is the assignee of an oil and gas lease on said lands, and its rights are not

sought to be affected, a stipulation having heretofore been entered into between it and petitioner, recognizing the validity of said oil and gas lease.

On January 15, 1930, respondents were the owners of two tracts of land, aggregating 107½ acres. On that day they executed a mortgage on said lands to Mabel Durbin, a sister-in-law of George W. Durbin, to secure their note for $1700.00, due 10 years after date, and bearing interest at the rate of 6% per annum, payable annually. (R. 210.)

On March 11, 1937, Mabel Durbin instituted proceedings to foreclose her mortgage, in the Circuit Court of Fayette County. Respondents were the only parties made defendants to said proceedings. They were served with summons, but filed no answer or other pleadings, and were defaulted. (R. 211.)

On May 15, 1937, a decree of strict foreclosure was entered in said proceedings, finding that there was due from the respondents to Mabel Durbin the sum of $2150.84, together with $100.00 attorney's fee. Said decree also found that respondents are wholly insolvent, and are unable to redeem said premises; that the mortgaged premises are meagre and scant security for the amount found to be due, and that the value of said premises is wholly insufficient to pay such amount, and that no benefit can inure to respondents by a sale of the mortgaged premises. (R. 212.) It directed payment of the indebtedness within three months, and in default thereof, respondents, and each of them, were to be forever barred and foreclosed from all equity of redemption and claim of, in and to said mortgaged premises. (R. 213.)

By quitclaim deed dated July 26, 1937, and recorded on July 29, 1937, Mabel Durbin and Harvey H. Durbin, her husband, conveyed all their interest in the lands to petitioner. (R. 222.)

By quitclaim deed dated July 26, 1937, and recorded on

June 18, 1938, respondents conveyed all their interest in the lands to petitioner (R. 225), and also, under date of July 28, 1937, executed a so-called "waiver of right of redemption," which instrument provided that in consideration of $50.00, respondent waived all right to redeem the lands in question. (R. 229.)

Pleadings of Respondents and Petitioner in the Litigation Here Involved.

On November 7, 1938, The Carter Oil Company filed its complaint in chancery, in the Circuit Court of Fayette County, Illinois, to redeem from the strict foreclosure, for the purpose of protecting its interest under its oil and gas lease on the property foreclosed. (R. 2.)

Respondents filed an answer and counterclaim in said proceedings. In the counterclaim, as well as in their amended answer, they alleged that they were the owners of the lands in question. They admitted the execution and delivery of the quitclaim deed to petitioner, but alleged:

1. That said deed was given pursuant to a verbal agreement with petitioner, under which petitioner was to pay to Mabel Durbin the amount due her under the foreclosure decree, and that respondents were to have two years from the date of said quitclaim deed within which to pay petitioner the amount so advanced by him, and that upon such payment, petitioner was to convey the property to respondents; that said quitclaim deed was intended to be only a mortgage to secure the amount advanced by petitioner (R. 59); that they had tendered to petitioner the amount required, which tender was refused. (R. 60.)

2. That the quitclaim deed from respondents to petitioner was not acknowledged, and therefore did not convey the homestead estate of respondents; that since the value of the lands involved did not exceed

$1000.00, no estate in said property whatsoever was conveyed to petitioner by said quitclaim deed. (R. 61-62.)*

The prayer of the counterclaim was, *first*, that the court decree that the deed from respondents to petitioner was in fact and effect but a mortgage to secure the amount advanced by petitioner for respondents; *second*, that the court decree that an agreement was in fact made between petitioner and respondents, for the reconveyance of the property, if respondents repaid to petitioner the amount so advanced, and that respondents, having complied with said agreement, are entitled to specific performance of said agreement, and *third*, that because no valid acknowledgment was made to the quitclaim deed, and because the value of the property conveyed did not exceed $1000.00, no estate whatsoever was conveyed by said deed to petitioner. (R. 62.)

Petitioner's reply to respondents' amended answer, and to their counterclaim, joined issue on the allegations thereof. Petitioner denied that the deed to him was intended as a mortgage, and asserted that said deed was, and was intended to be, an outright conveyance of the property involved; denied that any agreement was made between petitioner and respondents, under which petitioner was to advance to Mabel Durbin the amount due her under the foreclosure decree, and that respondents were to have the right to pay him the amount so paid to Mabel Durbin for her interest in the property, and receive a conveyance from petitioner; denied that the property was the homestead of respondents, and asserted that respondents had waived,

* Section 1 of Chapter 52, Illinois Revised Statutes, 1939, grants to every householder having a family an estate of homestead to the extent, in value, of $1,000.00, in the land and buildings thereon occupied as a residence. Section 4 of said Chapter provides that no conveyance of such homestead estate is valid unless subscribed by such householder, and his or her wife or husband, and acknowledged in the manner required for conveyance of real estate, or possession is abandoned or given pursuant to the conveyance.

released and abandoned their homestead estate in the property. (R. 68-69.)

The foregoing constitute the only issues made by the pleadings relative to the controversy between petitioner and respondents.

The case was tried before the Court. The testimony of petitioner and respondents was directed to the issues made by the pleadings. There was sharp conflict between the parties on the question of fact as to the making of the alleged agreement. The Chancellor found the issues in favor of petitioner, holding that the quitclaim deed was not given as security, but was an outright conveyance of all right and interest of the respondents in the property to petitioner; that respondents had no right of homestead in the property, and decreed that the counterclaim of respondents be dismissed for want of equity. (R. 90, 93.)

Petitioner appealed to the Supreme Court of Illinois on the issue of the validity of The Carter Oil Company lease (not here involved). Respondents filed a cross-appeal.

The brief and arguments of the parties in the Supreme Court of Illinois dealt solely with a review of the trial court's decision on the issues made by the pleadings and litigated by the parties. Respondents relied upon two propositions for reversal of the trial court's decree as to them—*first*, that the deed to petitioner was intended to be and was a mortgage, and *second*, that there was no valid conveyance, release or abandonment of the homestead estate. (R. 304.)

Opinion of the Supreme Court of Illinois.

On February 14, 1941, the Supreme Court of Illinois reversed that portion of the decree of the trial court which dismissed the counterclaim of respondents for want of equity, and remanded said cause to the Circuit Court of

Fayette County, with directions to enter a decree in favor of respondents in accordance with the views expressed in the Court's opinion. (R. 349.)

The opinion of the Court appears at pages 334 to 348 of the Record. In that opinion, the Court, after commenting on the contentions between the parties and the evidence in the record, holds that at the time of the conveyance from respondents to petitioner, a mortgagor-mortgagee relationship existed between the parties; that

> "This relationship is one about which the law is very strict, not only in Illinois, but everywhere. While it is not legally impossible for a mortgagee to acquire the mortgagor's equity of redemption, yet such a transfer or agreement to transfer is one that is jealously regarded by a court of equity and which will be strictly scrutinized for evidence of oppression, fraud or unfairness." (R. 345.)

The Court holds that to give validity to a conveyance of the equity of redemption from the mortgagor to the mortgagee, it must be shown that the conduct of the mortgagee was fair and frank, that he paid for the property what it was worth, that he exercised no undue influence, and took no advantage of the fears or poverty of the mortgagor.

The Court then proceeds to dispose of the controversy in the following language:

> "When this rule of law is applied to the transaction we are considering, only one result is possible. It is said that the mortgagee must not take undue advantage of the fears or poverty of a mortgagor and yet he did so in this case. The mortgagors were subject to a decree of strict foreclosure—the harshest remedy known to a court of equity; the mortgagors were indebted to the mortgagee on other indebtedness, in part represented by a chattel mortgage on the grain binder at harvest time with the crop ready to harvest; the mortgagors were said to be insolvent and were faced

with the imminent loss of their homestead. The rule requires that the mortgagee must show that he has been fair and frank and that he has paid for the property what it was worth. As to fairness and frankness Koeberlein did not even testify that he had told George and Minnie Durbin that he had been to Vandalia and settled with Mabel's attorney. The evidence affirmatively discloses that he paid absolutely nothing for the deed, merely promising to pay that for which he was already bound—*i. e.*, some notes on which he was surety and which, by the insolvency of the makers, he would have had to make good. The evidence also shows that no matter what the parties may have thought about the value of the land it was proved within less than the normal period of redemption to be worth a quarter of a million dollars. The rule is that any indirection or obliquity of conduct will be fatal to any title which the mortgagee acquires thereby, and yet such obliquities are numerous in this case. He falsely and fraudulently procured from the Durbins a power of attorney to sign their names to any papers necessary to settle with Mabel Durbin when he had already settled and knew that no such papers had to be signed on the deal he had made and would not be required for signature unless it might be upon some agreement extending the period of redemption. Under the most favorable interpretation to him he made himself their agent and liable to account. Under the only other possible interpretation he tricked and defrauded them. Other badges of fraud are apparent. Thus, we must notice the clandestine nature of the visit to the Durbin home without a notary public or disinterested witnesses, the procuring of fictitious acknowledgments and his failure to record the deed until demand for redemption. We must also note his obvious lack of frankness and honesty when he tried to deny his letter to Mabel's attorney, written by himself. A careful examination of his entire testimony which would unduly prolong this opinion would disclose other frailties. It is enough to say that he has not sustained the burden of showing that degree of fairness which the law requires of one who attempts

to secure this mortgagor's equity of redemption for himself." (R. 346.)

It is petitioner's contention that the Supreme Court of Illinois decided the cause on a proposition of fact and a theory wholly foreign to and in complete disregard of the issues made by the pleadings and litigated by the parties in the trial court, or the questions raised by the parties on the appeal, and thereby petitioner has been deprived of an opportunity to be heard on the issues and theory upon which final judgment has been rendered against him.

Jurisdiction.

1. The reversal by the Supreme Court of Illinois of the decree of the trial court in favor of petitioner, and the entry by that Court, of final judgment against petitioner, based upon a proposition of fact and theory not pleaded by respondents or litigated by the parties in the trial court, or raised on appeal, constitutes a denial of due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

2. The jurisdiction of this Court to review the judgment of the Supreme Court of Illinois, where the question sought to be reviewed is whether a violation of the rights guaranteed by the Federal Constitution has occurred, is expressly provided for by Judicial Code, Sec. 237, as amended by the Act of February 13, 1925.

3. The opinion of the Supreme Court of Illinois was filed, and its judgment entered, on February 14, 1941. (R. 334-348.) Petition for rehearing was filed March 10, 1941, and denied April 8, 1941.

4. In his petition for rehearing (R. 351-366), petitioner directed the attention of Supreme Court of Illinois to the fact that he had been deprived of an opportunity to be heard on the facts and the law as found and applied by that Court.

We refer to the following excerpts from said petition for rehearing:

> "Nowhere in the pleadings or at the trial or in the brief filed by the Durbins here was any contention made that Koeberlein was under any special duty toward the Durbins, or that he defrauded or overreached them.
>
> We respectfully submit that this Honorable Court has overlooked the pleadings of the parties and the issues litigated by them at the trial, and that it has considered and decided the case on a theory not presented below. The theory of the decision here is that when the Durbins made their deed to Koeberlein the relation of mortgagor and mortgagee existed between the parties, and that Koeberlein has not sustained the burden of showing that degree of fairness which the law requires of a mortgagee who attempts to purchase a mortgagor's equity of redemption.
>
> Since this theory of overreaching was not advanced by the Durbins at any stage of this case, Koeberlein has had no opportunity to be heard as to the application of the theory to this case, either on the facts or the law, and so we must ask the Court to bear with us in analyzing the facts in the record and applying the law to these facts, though this petition is somewhat longer than would otherwise be necessary." (R. 352-353.)

and

> "No allegation of fraud or overreaching appears in the pleadings of the Durbins. No such contention was advanced by the Durbins during the trial below or in their brief filed in this Court. The only question in controversy between the Durbins and Koeberlein is: Was there an agreement between the parties as claimed by the Durbins?
>
> We submit in all sincerity that it is unjust for a court of review to condemn a litigant and brand him a crook for alleged improper conduct and misdealings which were not alleged or otherwise made an issue by his adversaries on the trial." (R. 360-361.)

The petition for rehearing was denied, without further opinion. (R. 366.)

The Question Presented.

The sole question presented is whether the Supreme Court of Illinois violated the due process clause of the Fourteenth Amendment to the Federal Constitution, by reversing the decree of the trial court and rendering final judgment against petitioner, who had been successful in the trial court, upon a proposition of fact and a theory which had not been presented in the pleadings of the respondents or litigated at the trial, nor raised in the briefs of the parties filed in the Supreme Court.

Reasons Relied Upon for the Allowance of the Writ.

1. Respondents, in their counterclaim, alleged the existence of an agreement between them and petitioner, under which respondents allegedly had a right to redeem. Aside from the question of homestead, which was not passed upon by the Supreme Court of Illinois, and is not involved here, this was the only contention which, under the pleadings and at the trial, petitioner was required to meet. He did meet this issue successfully. The Supreme Court, in reversing the decree in his favor, wholly ignored the issue thus made by the pleadings, and litigated by the parties, and set aside the conveyance from the respondents to the petitioner, on the ground of fraud, oppression and unfair dealing. Petitioner has never had an opportunity to meet these issues. The most elementary principle of justice requires that he be given the opportunity to defend, before being condemned on these grounds and having his property taken away from him.

2. The opinion of the Supreme Court of Illinois brands petitioner a crook and perjurer, and as devoid of morals and ethics. His reputation as a merchant and banker of

many years' standing in his community is seriously impugned. Yet his conduct in connection with the transaction involved was not even questioned by the respondents. If the decision of the Supreme Court of Illinois is to stand, petitioner loses not only the lands involved, but also his reputation and good name, without ever having had the opportunity to meet the charges of which the court has convicted him.

A certified copy of the record in said suit in the Supreme Court of Illinois, including the abstract of record, proceedings, opinion and disposition of the cause had in said Court, is herewith furnished and lodged in the office of the Clerk of this Court, in compliance with Rule 38 of the rules of this Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of this Court, directed to the Supreme Court of Illinois, commanding that Court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all the proceedings had in the case numbered and entitled on its docket as No. 25765, The Carter Oil Company, a corporation, Plaintiff-Appellee, *vs.* Mabel Durbin, Harvey H. Durbin, George W. Durbin and Minnie L. Durbin, Defendants-Appellees, and Charles M. Koeberlein, Defendant-Appellant and Cross-Appellee, George W. Durbin and Minnie L. Durbin, Appellants on Cross Appeal, and that said opinion and judgment of the Supreme Court of Illinois may be reversed by this Court, with directions that this cause be remanded to the Circuit Court of Fayette County for further proceedings, in which, if the respondents desire, their pleadings may be amended to encompass the issues of fraud, unfair dealing and overreaching, and additional evidence may be taken, and petitioner may have

full opportunity to present his defense, and that petitioner have such other and further relief in the premises as to this Court may seem meet and just.

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